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COURT OF APPEAL, FOURTH APPELLATE DISTRICT

DIVISION ONE

STATE OF CALIFORNIA

RICHARD ROGERS, Plaintiff and Appellant, v. NANCY PETERSON, Defendant and Respondent.	D055232 (Super. Ct. No. 37-2007-00061885-CU-PA-EC)

APPEAL from a judgment of the Superior Court of San Diego County, Laura W. Halgren, Judge. Affirmed.

Cars driven by Richard Rogers and Nancy Peterson sideswiped near an intersection in La Mesa, California. Each party claimed the other responsible for the accident.

Peterson testified she was traveling no faster than 10 miles an hour when the accident occurred. Immediately before the accident, Peterson testified she stopped at a stop line in a bank parking lot, crept forward at about five miles per hour because of a dip

in the road, and then, after looking both ways, slowly made a left turn onto the street where Rogers was driving in the opposite direction. Rogers testified he saw Peterson's car, believed she would come to a complete stop, but instead she pulled out "fast" into traffic, where the two cars hit in what Peterson contends was a "minor" impact. Immediately before the accident, Rogers estimated he was traveling about 20 miles per hour; Peterson estimated she was going no faster than 10 miles per hour at impact.

The case proceeded to trial. Rogers claimed he sustained severe and debilitating back and neck injuries because of the accident. The jury found Peterson negligent. However, on the issue of causation, the jury found Peterson's negligence was not a substantial factor in causing harm to Rogers. The trial court denied the post-trial motions of Rogers and entered judgment for Peterson.

On appeal, Rogers claims the trial court erred in denying his motion for judgment notwithstanding the verdict on the issue of causation and his motion for new trial on the issue of damages and comparative fault because the record is devoid of evidence, much less substantial evidence, to support the verdict in light of his claim that he sustained some damage as a legal cause of Peterson's negligence. As we explain, we disagree and affirm the judgment.

FACTUAL AND PROCEDURAL BACKGROUND

Because this is an appeal from the denial of a judgment notwithstanding the verdict (JNOV), we must indulge all inferences in favor of the jury verdict (*Czubinsky v. Doctors Hospital* (1983) 139 Cal.App.3d 361, 364), and present the facts in the light most

favorable to the verdict. (*Hansen v. Sunnyside Products, Inc.* (1997) 55 Cal.App.4th 1497, 1510.)

A. *The Accident*

Rogers testified that after leaving the bank in early November 2005, as he often did he drove southbound on Date Street in La Mesa to return to his office for a client meeting. When he approached the intersection of Allison and Date, he stopped and then continued southbound a few seconds after a bus turned from Allison onto Date.

As he proceeded through the intersection, Rogers saw Peterson's car moving toward a credit union driveway exit. Rogers saw Peterson's car stop, and he believed it was safe to proceed. However, Rogers saw Peterson start moving again, as she turned to travel north on Date. Rogers testified that Peterson pulled out "fast" onto Date. As Peterson pulled into his lane, Rogers applied his brakes as hard as he could, swerved and honked the horn. Rogers struck the rear passenger's side *wheel* of Peterson's car.

Peterson testified that as she left the parking lot of the credit union, where she had been many times, she stopped at the stop line. She looked left, but a bus was obstructing her view of Date. She next crept forward in her car to the edge of the street, started moving at about five miles per hour and then slowed even further for a dip in the road. Peterson again looked left, then right, and seeing no cars in either direction, and with the bus stopped, she proceeded slowly onto Date traveling at most 10 miles per hour. At the time of the collision, the two cars were nearly parallel, albeit pointing in opposite directions, with Peterson's car only about six inches in Rogers's lane.

Peterson also testified she did not hear a horn before impact, she took no action to avoid Rogers because she did not see his car until it was only a few feet from her car and she did not believe they would hit. Immediately after the impact, Peterson got out of her car, walked over to Rogers and asked him why he did not stop. In response, Rogers exclaimed, "I couldn't stop." Peterson, who worked for more than 25 years as a trauma nurse in the emergency room at a local hospital, testified Rogers "didn't seem right" immediately after the accident. She said his speech was slow and he appeared dazed.

After the accident, Rogers drove his car to a police station located immediately adjacent to the scene of the accident. When paramedics arrived, Peterson heard Rogers say he did not believe it was necessary for him to go to the hospital. However, after Rogers's wife arrived at the scene, she insisted he go to the hospital. Peterson testified she could hear Rogers and his wife talking after the accident and he never complained of any pain or symptoms from the accident. Peterson testified that she believed Rogers was "100 percent" at fault for the accident.

B. *Injuries and Damages*

Before the accident, Rogers suffered from severe acid reflux and "Barrett's Esophagus," which Rogers described as a condition where the stomach enters the esophagus and causes severe heartburn. Rogers had surgery to treat that condition. Also in 2004, Rogers suffered from anxiety and stress and took medication to relieve his symptoms; he also experienced memory loss and suffered from "chronic fatigue" during this time period. He testified the chronic fatigue sometimes prevented him from walking more than 10 or 15 feet.

Beginning in December 2002, Rogers went on work restriction that limited him to four hours of work per day because of the medication he was taking and because of his physical condition. Rogers admitted in a letter he wrote in March 2004 that he was addicted to pain medication and had memory problems.

Medical records show that several years before the accident Rogers complained of pain in his knees. The pain was particularly acute in his left knee, which he injured in a slip and fall accident in or about 1996. Rogers claimed his left knee "ach[ed] all the time" and "buckle[d]," which led to a loss of stability. In May 2006, Rogers indicated in his application for temporary disabled placard that he was disabled because of chronic fatigue and "severe left knee dysfunction."

Rogers testified he was in a car accident in 1982, where he suffered a back and knee injury and received physical therapy for about a month. In 2002, he strained his back while constructing an enclosed patio that led to one treatment with a chiropractor in Ramona.

Rogers testified he sustained injuries to his back, neck and head from the accident with Peterson. The medical records from Rogers's visit to the emergency room (ER) on the day of the accident show Rogers had felt lightheaded and dizzy a day or two before. Those same records show Rogers's spine and neck moved freely during the physical examination by the ER doctor, and there was no sign of any swelling or joint pain in Rogers's muscles, joints, ligaments and bones. The chest X-ray and "C.T." of Rogers's head were both negative.

After the accident, Rogers's doctor referred him to a chiropractor, who treated Rogers 123 times. The chiropractor provided Rogers with temporary pain relief from the injury to his middle and lower back. Rogers's doctor also referred him to a neurologist. In addition to medication, Rogers also tried physical therapy "a couple of days" for pain relief.

Rogers returned to work about 10 days after the accident. He worked about four hours a day.

About a month after the accident, Rogers claimed he began having significant problems with his left arm. The numbness he experienced after the accident began to fade, but in its place he experienced a loss of dexterity in three of his fingers. He also lost strength in both arms, although the loss of strength was more pronounced in his left arm. Rogers next saw a neurosurgeon, who advised Rogers he needed a neck "fusion" to regain any mobility in his neck. The neurosurgeon could not guarantee Rogers that the fusion would help him, and that even with the surgery, Rogers likely would experience neck problems for the rest of his life. Rogers underwent a three-level fusion of his cervical spine in May 2008.

After the surgery, Rogers testified that he was able to "close a fist," but not "make a fist," and described his "grip strength" as such that, if he was asked to hold a bottle in his left hand, it would fall right through. He noted he was able to carry things in his left hand if he used his thumb and index finger to pinch and control the item. But he said he was unable to use tools, for example, for maintenance around the house, if the tool required him to use more than his left index finger and left thumb.

Rogers said he wakes up with significant pain each morning, when his medication has worn off, but that with medication he feels a little less pain during the day. Rogers still experiences back pain "every day," but at least he has been able to resume some activities that require use of just one hand, such as changing the oil in his car. Rogers said the pain in his back prevents him from bending over and touching his toes.

Since the surgery, he also has experienced trouble swallowing and talking, and drives only short distances unless he is having a "bad day," when he said he does not drive at all.

Rogers and his medical expert, Carla Young, M.D. (whose testimony is discussed *post*), each testified that after the accident Rogers was unable to raise his arms above shoulder level. During one examination by Dr. Young, Rogers's shoulders "locked" after Dr. Young manually helped Rogers raise his arms above shoulder level. Rogers was in pain during this examination. At trial on the witness stand, Rogers demonstrated for the jury the lack of mobility in his shoulders.

C. *Surveillance Video*

The defense retained Dean Kelly as a private investigator to conduct surveillance of Rogers. Kelly authenticated surveillance video taken through tinted windows of a car. The surveillance spanned various days beginning in mid- to late-December 2008 to mid-January 2009. When Kelly saw Rogers, he shot the video, and testified at no time did he make any edits to the video tape. The video subsequently was edited to about 17 minutes of tape for trial purposes and was shown to the jury.

In the tape, Rogers is depicted performing myriad functions without any apparent distress that he claimed on the witness stand he could not perform,[1] including picking up and grasping various items with his left hand (e.g., a rock, trash bags); bending over at the waist for a prolonged period of time and, in one instance, picking up a pet while bent over and standing back up with the pet in his arms; and extending his arms well-above shoulder level.

D. *Testimony of Defense's Medical Expert*

Richard Ostrup, M.D., testified as a medical expert on behalf of Peterson. As a neurosurgeon, Dr. Ostrup was asked to evaluate the nature of Rogers's injuries and to address whether any of those injuries resulted from the accident with Peterson and if so, what treatment, if any, was warranted for those injuries.

Dr. Ostrup performed an independent medical examination (IME) on Rogers in April 2008, shortly before Rogers underwent surgery on his spine. The IME included taking a medical history of Rogers, which Dr. Ostrup testified was important to his evaluation.

Dr. Ostrup testified that during the IME Rogers mainly complained about problems in his neck and left arm and hand. Rogers also told Dr. Ostrup he was having back spasms during the IME. However, Dr. Ostrup found no sign of back spasms.

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1 Pursuant to California Rule of Court, rule 8.224, Peterson transmitted a copy of the 17-minute video (trial exhibit 191) to this court, which independently reviewed the video in connection with this appeal.

Dr. Ostrup had Rogers perform various tests to evaluate Rogers's muscle strength, including his grip strength. Dr. Ostrup testified that Rogers had normal strength in the left thumb muscle (e.g., abductor pollicis brevis). Although Rogers claimed he could not move his little finger, which Rogers's experts opined was caused by nerve root compression as a result of the accident, Dr. Ostrup testified that it was "not anatomically possible" for Rogers to have normal strength in his thumb and be unable to move his little finger because of nerve root compression, inasmuch as both muscles receive information from the *same* nerve. In other words, if Rogers was suffering from nerve root compression, Dr. Ostrup opined the muscle in Rogers's thumb and little finger would both be weak.

Dr. Ostrup also tested Rogers's left upper extremity by rotating Rogers's biceps, the deltoid and triceps. Dr. Ostrup concluded that Rogers was not reporting as accurately as he could his weakness, or lack thereof, in his upper extremity. Dr. Ostrup also noted no muscle atrophy in Rogers's upper left extremity, which Dr. Ostrup testified would exist if Rogers had significant nerve injury. Dr. Ostrup found Rogers had normal reflexes on "both sides" and found the lumbar examination suggested no "organic findings in [Rogers's] lower extremities and particularly the left leg."

As a result of the examination, Dr. Ostrup told Rogers that he would not be well served by having an operation on his spine. Dr. Ostrup gave Rogers this advice despite the fact Rogers was not Dr. Ostrup's patient. Dr. Ostrup believed it was his ethical obligation as a physician to inform Rogers he could be making a mistake if he had the

surgery, and suggested Rogers at least discuss the issue further with his own neurosurgeon.

After examining Rogers, Dr. Ostrup reviewed Rogers's extensive medical records both from before and after the accident. Dr. Ostrup testified the medical records showed that before the accident, Rogers had a documented history of lower back problems, suffered from chronic fatigue, anxiety, depression, dizziness, drowsiness, general weakness and poor balance and experienced problems with his esophagus, including problems swallowing.

In addition, Dr. Ostrup noted in Rogers's dental records that in September 2004, under "medical history" there was a notation that Rogers was taking "up to 12 Percocet per day" for "low back" and "neck pain."

Dr. Ostrup also reviewed the medical records of Rogers from the ER on the day of the accident. Dr. Ostrup found it significant that there was no documentation of Rogers experiencing any neck or back pain. This suggested to Dr. Ostrup that Rogers did not sustain any acute injury from the accident.

Based on the review of all of Rogers's medical records, including those from his primary care physician, his neurologist and his neurosurgeon, Dr. Ostrup opined as follows: "I don't think relative to the accident that he [Rogers] sustained problems related to his neck. I think he may have had a possible lumbar strain, but nothing that I felt required any surgery or anything aggressive. . . . [¶] . . . [¶] Now, most people in my experience, they may say I get in a car wreck or I have an incident, and they'll say, you know, I thought the pain would go away in a couple of weeks and then I did finally seek

medical attention, and then they have to try and determine issues of causation, et cetera. [¶] Now, here, you've got a documented medical record of [Rogers] being seen in a day, talking to someone else within a day or two afterwards, and so he's been seen by three physicians . . . three physicians within a four-day period, and I don't see any documented complaints of any type of significant neck pain. So well within reasonable medical probability [Rogers] did not sustain a cervical injury."

Dr. Ostrup disagreed with the medical testimony of Rogers's expert, Mark H. Mikulics, M.D. (discussed *post*), who testified that symptoms associated with a neck strain or a cervical spine injury, such as whiplash, may not manifest for two weeks after the injury. Dr. Ostrup instead opined that the "vast majority of people" with such injuries will complain of pain within a short time period, and that a person does not just "sprain a muscle and have it hurt two to three weeks later."

Dr. Ostrup noted it was "reasonable" for Rogers to receive some treatment after the accident for a lumbar sprain, and perhaps receive some medication, but that Rogers's symptoms should have improved within six weeks after the accident. Based on Rogers's complaints of weakness and his other issues, Dr. Ostrup testified it was reasonable for Rogers's neurologist to order electrical studies and an MRI on Rogers about a month after the accident.

According to Dr. Ostrup, the electrical studies (also known as an EMG) were normal. The MRI study showed no evidence of any acute or traumatic injury to Rogers's spine, but showed some "moderate narrowing" in the spine that Dr. Ostrup stated was

normal for a man like Rogers in his late 50's. Thus, Dr. Ostrup opined Rogers's spinal surgery was unnecessary.

Five days after Dr. Ostrup examined Rogers, Rogers met with his neurosurgeon, Sanjay Ghosh, M.D. In reviewing records from that consultation, Dr. Ostrup found it suspicious that there was no reference of any discussion between Rogers and Dr. Ghosh regarding Dr. Ostrup's concerns that surgery was unnecessary. Dr. Ostrup also testified there was nothing in the records showing that Dr. Ghosh conducted a neurological examination of Rogers during that appointment, despite the fact Dr. Ghosh had not seen Rogers in three months and despite the fact Rogers's appointment was a "pre-op evaluation." Dr. Ostrup also stated there was nothing in the records suggesting that Dr. Ghosh reviewed a second MRI study of Rogers from December 2007, where the radiologist said the only encroachment on Rogers's spine was at the C6 area on the left.

Dr. Ostrup also took issue with the diagnosis of Dr. Mikulics that Rogers had myelopathy (which as discussed *post*, is where the spinal cord is compressed). Dr. Ostrup noted Dr. Mikulics was incorrect when he testified a "Babinski sign" is when the toes curl down, when according to Dr. Ostrup it is actually when the toes curl up. Dr. Ostrup also noted that Dr. Mikulics did not know that a "Hoffman sign" is a sign elicited by a doctor to determine whether someone has a spinal cord problem.

Dr. Ostrup noted a lack of documentation in Dr. Mikulics's records of any upper motor neuron findings, which Dr. Ostrup testified would be required, along with imaging studies, to determine the location of the compression on the cord. Dr. Ostrup opined it was extremely rare for a patient with myelopathy to experience pain, which was a chief

complaint of Rogers, and noted there was no mention in Dr. Ghosh's operative records that Rogers's spine was compressed. That there was a large amount of "disk material" herniated into the epidural space at C4-5 and C5-6 did not, according to Dr. Ostrup, support the inference of nerve compression testified to by Dr. Mikulics.

Dr. Ostrup also disagreed with Dr. Mikulics's belief that Rogers's surgery was a success, given Dr. Ostrup's opinion that Rogers's doctor (at the time of trial) was suggesting that Rogers was a candidate for a "spinal stimulator or a pain pump," and given that Rogers was having difficulty with everyday activities eight or nine months after the surgery.

Finally, Dr. Ostrup disagreed with Dr. Mikulics's testimony that Rogers would need an additional surgery to remove the screws and plate used in Rogers's spinal fusion surgery. Dr. Ostrup testified that he has performed "thousands" of such surgeries (e.g., angio cervical diskectomies) and he could not recall one occasion where in a follow-up surgery he removed the plate from a patient. Dr. Ostrup thus said it was "ridiculous" for Dr. Mikulics to conclude that two-thirds of the people who have this surgery subsequently need the plate removed, and testified Rogers's swallowing problems were the result of his esophageal issues and not because of the plate.

E. *Testimony of Plaintiff's Medical Experts*

1. *Dr. Mikulics*

Dr. Mikulics is an orthopedic surgeon. Like a neurosurgeon, Dr. Mikulics testified an orthopedic surgeon performs spinal surgery. Dr. Mikulics noted he had not performed a cervical fusion like the one performed on Rogers since he was a resident in 1989.

Dr. Mikulics in June 2007 determined Rogers needed surgery on his spine and the injury to Rogers's spine was related to the car accident involving Peterson.

Dr. Mikulics testified that after Rogers's surgery, Dr. Mikulics diagnosed Rogers with radiculopathy, myelopathy and an annular tear in his lumbar spine. Dr. Mikulics testified radiculopathy "is when a spinal nerve is being compressed," whereas "[m]yelopathy is when the spinal cord itself is being compressed . . . ." According to Dr. Mikulics, a patient with either condition will experience pain and/or numbness or tingling in the distribution of that nerve root.

Dr. Mikulics said a ruptured or torn annulus, which he described as the "tough outer part" of the ring around the disc, can cause back pain. Because Dr. Mikulics believed Rogers was asymptomatic before the accident, Dr. Mikulics determined the accident with Peterson caused Rogers's radiculopathy and myelopathy.

Dr. Mikulics opined that it was not uncommon for an individual injured in an accident to have mild symptoms at first and for those symptoms to become progressively worse after a few weeks, leading to neck pain, numbness and tingling, among other symptoms.

Dr. Mikulics compared the MRI film of Rogers taken in December 2005 to Rogers's December 2007 MRI and concluded that Rogers's disc degeneration had gotten worse. Dr. Mikulics noted, however, that Rogers's degenerative disc disease was not caused by the accident. As noted *ante*, Dr. Mikulics also determined that Rogers likely would need a second surgery to have the plate removed from his neck because of the swallowing difficulties Rogers was experiencing.

2. *Dr. Young*

Dr. Young is a specialist in the treatment of pain, including chronic pain, which Dr. Young defined as pain that is present for at least six months. Dr. Young first saw Rogers as a patient at the end of October 2008, after Rogers's surgery. Dr. Young determined Rogers had multiple neurological abnormalities, particularly in his upper extremities, with more weakness on his left side.

Dr. Young opined that Rogers suffers from ongoing pain as a result of the car accident, and that Rogers pain is primarily in his neck, back, arms and left lower extremity. From the MRI files of Rogers, Dr. Young determined that Rogers suffered from degenerative disc disease, which Dr. Young noted is very common, and that as a result of the car accident involving Peterson, Rogers experienced trauma to his spine that led to changes in the nerve roots that exit the spine and thus to Rogers's chronic pain. Once damaged, Dr. Young noted there is no good mechanism for regenerating the nerves responsible for the pain sensation.

As a result of his chronic pain, Dr. Young opined that Rogers is unable to work full time. Moreover, even when Rogers works part time, Dr. Young said he will need multiple accommodations to manage his pain.

Dr. Young also testified that Rogers was unable to lift his arm above 90-degrees bilaterally. As a result, Dr. Young diagnosed Rogers with "bilateral frozen shoulders."

F. *Testimony of Percipient Witness*[2]

Thomas Valentine testified he was outside a bank smoking a cigarette when he saw the accident. He saw a car (driven by Peterson) pull out of a driveway and make a "normal" left turn when he saw a small yellow station wagon (driven by Rogers) come down the street. Valentine noticed the station wagon "wasn't stopping or anything." Valentine testified Rogers did not veer in his car, or attempt to slow down, to avoid the impact with Peterson, and that Rogers was not traveling so fast that he could not have stopped and avoided the accident. Valentine also said there was no skid before the accident. A few seconds after the accident, Valentine saw Rogers drive a short distance, stop, get out of his car and open the hood. Valentine testified Rogers did not check on Peterson before he drove to the back of the police station and got out of his car.

G. *Trial and Findings*

Trial commenced in late January 2009. In early February 2009, the jury returned its verdict on a special verdict form. As relevant to this appeal, the verdict form provided:

"WE, THE JURY, answer the following questions submitted to us as follows:

"1. Was the defendant Nancy Jean Peterson negligent?

"Yes X No __

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2 The jury also heard testimony from the parties' respective accident reconstruction experts regarding the accident. To the extent it is relevant to our analysis, we discuss that testimony *post*.

"If your answer to question No. 1 is 'yes', answer question No. 2. If your answer to question No. 1 is 'no', stop here, sign and return the verdict form to the bailiff.

"2. Was the negligence of defendant Nancy Jean Peterson a substantial factor in causing harm to plaintiff?

"Yes __ No X

"If your answer to question No. 2 is 'yes', answer question No. 3. If your answer to question No. 2 is 'no', stop here, sign and return the verdict form to the bailiff."

Question No. 3, which the jury never reached, asked the jury to determine Rogers's economic and non-economic damages, and instructed the jury *not* to reduce his damages "based on the fault, if any" of Rogers. Question Nos. 4, 5 and 6, which the jury also never reached, asked whether Rogers was negligent, and if so, whether his negligence was a "substantial factor" in causing his harm and if so, to allocate the percentage of responsibility for Rogers's harm between Peterson and Rogers.

Following the verdict, Rogers filed a motion for judgment notwithstanding the verdict on the issue of causation and a motion for new trial on the issue of damages, among other things. The trial court denied both motions.

At the hearing on the motions, the trial court noted it reviewed the parties' voluminous papers, including Rogers's reply brief, recalled "quite well" the trial and reviewed the court's own trial notes. Rogers's counsel argued the jury's verdict "trivialized" Rogers's emotion and the two-year "ordeal" he went through in this case because the jury verdict said what Rogers's experienced "is worth nothing," and he gets "no money for [his] pain and suffering and no money for [his] expenses."

The trial court disagreed, noting as follows: "I don't view the verdict as telling [Rogers] necessarily that the things he has gone through are worth nothing. It's just that they found [Peterson's] negligence was not a substantial cause of his damages, *and that could have been, in part, a finding that it wasn't a substantial cause of the collision and/or a substantial cause of his injuries*." (Italics added.) In response, Rogers's counsel noted the trial court's analysis was "correct."

Later, during the hearing, the trial court again reminded Rogers's counsel that his argument in the post-trial motions assumed the evidence "mandated a conclusion" that Peterson "substantially caused the collision, the actual impact." The trial court also noted Rogers's own testimony that immediately after the accident, Rogers did not want to go to the hospital, and thus the jury could well have found that Rogers had "nominal damage that wasn't even worth an award of monetary damage."

Thus, the trial court concluded in light of the evidence and the "standard that I need to follow when we are looking at the claim of new trial for insufficient evidence, although I used my independent judgment, I need to weigh the evidence and be convinced from the entire record that the jury clearly should have reached a different verdict and I just can't make that finding."

DISCUSSION

I

A. *Standard of Review and Statement of Issues*

Rogers invokes the substantial evidence standard of review in connection with the court's denial of his JNOV motion and his motion for new trial.

When a jury's factual determination is challenged on appeal, we must determine whether any substantial evidence, contradicted or uncontradicted, supports the jury's conclusion. (*Piedra v. Dugan* (2004) 123 Cal.App.4th 1483, 1489.) We must review the entire record in the light most favorable to the judgment below and presume in support of the judgment the existence of every fact the trier could reasonably deduce from the evidence. (*Jonkey v. Carignan Construction Co.* (2006) 139 Cal.App.4th 20, 24.) " ' "[W]hen two or more inferences can reasonably be deduced from the facts, a reviewing court is without power to substitute its deductions for those of the [fact finder]. *If such substantial evidence be found, it is of no consequence that the [jury] believing other evidence, or drawing other reasonable inferences, might have reached a contrary conclusion.*" [Citation.] . . . ' " (*Piedra v. Dugan, supra,* 123 Cal.App.4th at p. 1489.)

Rogers argues in his brief that although the jury found negligence on the part of Peterson, it "inexplicably found [Rogers] sustained zero damages as a legal cause of [Peterson's] negligence." Rogers further argues that his appeal "presents the very narrow issue of whether the jury's verdict of *zero damages* was supported by substantial evidence" (italics added), and that "reversal is required based upon the undisputed evidence at trial that [Peterson's] negligence was the legal cause of *some* damage to [Rogers]."

However, we note from the jury's special verdict that it never reached the issue of damages. Thus, we disagree with Rogers's issue statement that the jury found he sustained "zero damages." Instead, what the jury found was Peterson, while negligent, and perhaps a factor, was not a *substantial* factor in causing harm to Rogers. We note

this finding by the jury could be based on the evidence that Rogers was unharmed in the accident, that any harm he claimed he suffered was pre-existing, or, as the trial court noted, that Peterson was not the legal cause of the collision.

In any event, Rogers's appeal challenges a *negative* finding (no causation). As such, under the applicable standard of review Rogers must establish the evidence compels the contrary finding (causation exists) as a matter of law, i.e., under no reasonable hypothesis could a jury find Peterson's negligence did not cause his injuries. (See *Horn v. Oh* (1983) 147 Cal.App.3d 1094, 1099; see also *Vasquez v. Residential Investments, Inc.* (2004) 118 Cal.App.4th 269, 288 [causation "generally is a question of fact for the jury"].)

B. *Causation*

The issue of whether Peterson caused Rogers's alleged harm was for the *jury* to decide. (See *Vasquez v. Residential Investments, Inc.*, *supra*, 118 Cal.App.4th at p. 288 [causation is a question of fact for the jury and becomes an issue of law only when the facts are undisputed and only one conclusion may be drawn].) Our review of the record confirms the finding of the trial court, made in connection with its independent review of the evidence, that substantial evidence supports the jury's finding that Peterson was not a substantial factor in causing Rogers's alleged harm.

Initially, like the trial court we note there is evidence in the record that Rogers was *unharmed* in the collision. Indeed, immediately after the accident Rogers said he was fine and did not want to go to the hospital for treatment. Although Rogers disagrees with this conclusion, as a court of review we do not reweigh the merits of his case. (*See*

Piedra v. Dugan, supra, 123 Cal.App.4th at p. 1489 [under the applicable standard of review, when a jury's factual determination is challenged on appeal, as here, our task is limited to determining whether any substantial evidence, whether contradicted, supports the jury's conclusion].)

Moreover, the medical records from Rogers's ER visit immediately after the accident show his neck and spine moved freely, he showed no signs of swelling or pain in his muscles, ligaments and/or bones, and his chest X-ray and CAT scan were both negative. Rogers's medical records also show that Rogers saw three physicians within a four-day period following the accident (including the ER doctor), and there was no documentation from any physician of complaints by Rogers of neck or cervical injury from the accident.

The jury also reviewed a 17-minute surveillance tape (discussed *ante*) of Rogers showing him engaging in activities that he claimed on the witness stand he was incapable of undertaking because of the collision. "The trier of fact is the sole arbiter of all conflicts in the evidence, conflicting interpretations thereof, and conflicting inferences which reasonably may be drawn therefrom; is the sole judge of the credibility of the witnesses; may disbelieve them even though they are uncontradicted if there is any rational ground for doing so, one such reason being the interest of the witnesses in the case; and, in the exercise of a sound legal discretion, may draw or refuse to draw inferences reasonably deducible from the evidence." (*Horn v. Oh*, *supra*, 147 Cal.App.3d at p. 1099.)

Here, there is substantial evidence to show Rogers was unharmed in the accident, and that this finding, which is reasonable based on the evidence, supports the jury's determination that Peterson's conduct was not a substantial factor in causing Rogers's alleged harm.

In addition, the record shows that before the accident, Rogers had a documented history of lower back problems, suffered from chronic fatigue, anxiety, depression, dizziness, memory loss, drowsiness, general weakness and poor balance, and experienced problems with his esophagus, including problems swallowing. Rogers's dental records from September 2004 show Rogers was taking "up to 12 Percocet per day" for "low back" *and* "neck pain."

The record also shows that beginning in December 2002, Rogers went on work restriction that limited him to four hours of work per day because of the medication he was taking and because of his physical condition.

This evidence supports the finding that Peterson was not a substantial factor in causing Rogers's alleged injuries, inasmuch as the evidence shows Rogers suffered from pre-existing medical conditions for which he sought damages based on the accident.

Finally, there is substantial evidence to the support the trial court's theory that a reasonable jury could have found that Peterson's conduct was not a substantial factor in causing the *collision*. Indeed, Peterson testified that at the time of the collision with Rogers, their cars were nearly parallel, albeit pointing in opposite directions, with Peterson's car only about six *inches* in Rogers's lane.

Peterson also testified she did not hear a horn before impact (a fact disputed by Rogers), she took no action to avoid Rogers because she did not see his car until it was only a few feet from her car and she did not believe they would hit. Immediately after the impact, Peterson got out of her car, walked over to Rogers and asked him why he did not stop. In response, Rogers exclaimed, "I couldn't stop."

In addition to the parties' accident reconstruction experts, the jury also heard from Valentine, the only percipient witness to the accident. Valentine testified that Peterson made a "normal" turn out of the bank parking lot and that Rogers did not attempt to slow his car down, stop or veer to avoid the collision with Peterson. He also testified that Rogers was not traveling so fast that he could not have stopped and avoided the accident. Rogers's accident reconstruction expert testified the force of the impact was such that the airbag in Rogers's car did not deploy.

Moreover, Peterson worked for 25 years as a trauma nurse in an ER. She testified that immediately after the accident Rogers "didn't seem right," his speech was slow and he appeared dazed. The jury also heard evidence that at the time of the accident, Rogers was taking various medications, including for pain, that Rogers complained of lightheadedness and dizziness a day or two before the accident and that Rogers had a history of taking pain medication and believed at one point (in March 2004) that he was addicted to pain medication.

Although there are other reasonable explanations for, and inferences to be drawn from, all this evidence, including that Rogers was dazed and did not seem right *because of* the accident, and that he did in fact attempt to avoid the accident but could not, the fact

the jury could have reached a different finding based on such evidence is not relevant under the applicable standard of review. (See *Piedra v. Dugan, supra,* 123 Cal.App.4th at p. 1489 [" ' "when two or more inferences can reasonably be deduced from the facts, a reviewing court is without power to substitute its deductions for those of the [fact finder]. . . ." ' "]) The record thus contains substantial evidence to support the reasonable hypothesis that Rogers, and not Peterson, was a substantial factor in causing the collision and Rogers's alleged resulting harm. (See *Horn v. Oh, supra,* 147 Cal.App.3d at p. 1099.)

Relying on *Bencich v. Market St. Ry. Co.* (1937) 20 Cal.App.2d 518, Rogers argues that to the extent there is some evidence of comparative fault by him in connection with the collision, such evidence "cannot be the basis for affirmance of the trial court's denial of appellant's motion for a new trial based upon the jury's failure to find causation."

In *Bencich v. Market St. Ry. Co.* the jury awarded plaintiff only $5,000 after plaintiff, a fire fighter, sustained severe and debilitating injuries from an accident between a fire truck, on which plaintiff was riding, and a "street car." Plaintiff's injuries included, among others, a badly crushed right foot that ultimately required surgery for removal of a portion of that foot because of gangrene and multiple skin grafts, a fractured left humerus and traction for his injured arm and leg. (*Bencich v. Market St. Ry. Co., supra,* 20 Cal.App.2d at p. 521.) Plaintiff spent about six months in the hospital recuperating from his injuries, and incurred substantial medical expenses and suffered lost wages. (*Ibid.*)

Plaintiff moved for a new trial on the main ground the amount of the verdict was inadequate and thus not justified by the evidence. The trial court denied the motion. (*Bencich v. Market St. Ry. Co.*, *supra*, 20 Cal.App.2d at p. 520.) On appeal, the court concluded there was "little question . . . the verdict was clearly inadequate, so inadequate, in fact, that the evidence did not justify the jury in awarding such small damages for such a severe injury, and so inadequate that the failure of the [trial] court to grant a new trial constituted a clear abuse of discretion in denying the motion for new trial, unless as contended by [defendants] the evidence shows that plaintiff is barred from *recovering* at all." (*Id.* at p. 521.)

The defendants in *Bencich v. Market St. Ry. Co.* argued the trial court correctly denied defendant's motion for new trial because, among other things, plaintiff was contributorily negligent for the accident.[3] The court noted for it to decide the trial court did not abuse its discretion in denying plaintiff's new trial motion based on inadequacy of damages, it needed to be "*clearly established* by the *evidence as a whole*" that defendant was contributorily negligent. (*Bencich v. Market St. Ry. Co.*, *supra*, 20 Cal.App.2d at p. 524.) That there was merely "some evidence" of contributory negligence or merely a "conflict" in the evidence was insufficient, according to the court. (*Ibid.*)

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3 *Bencich v. Market St. Ry. Co.* was decided almost four decades before our supreme court in *Li v. Yellow Cab Co.* (1975) 13 Cal.3d 804, 808, abrogated the rule that a plaintiff's contributory negligence bars *all recovery* when the "plaintiff's negligent conduct has contributed as a legal cause in any degree to the harm suffered by [plaintiff]," and replaced it with a system of comparative negligence.

As applied here, *Bencich v. Market St. Ry. Co.* actually supports the trial court's denial of Rogers's new trial motion. We note the issue in *Bencich v. Market St. Ry. Co.* was inadequacy of damages, as liability for the plaintiff's injuries, unlike the case at hand, was firmly established based on the evidence in the record, although that evidence, like the case at hand, was conflicting. The court in *Bencich v. Market St. Ry. Co.* was thus unwilling to reverse the *jury's* finding of liability based on plaintiff's contributory negligence, which goes to causation, unless plaintiff's contributory negligence was "*clearly established* by the evidence *as a whole*." (*Bencich v. Market St. Ry. Co.*, *supra*, 20 Cal.App.2d at p. 524.) In other words, the fact there was "some evidence" of plaintiff's contributory negligence in *Bencich v. Market St. Ry. Co.* was insufficient to warrant reversing the *jury's* finding of liability, which finding was supported by substantial evidence.

Likewise, in the instant case there clearly was a conflict in the evidence regarding whether Peterson was a substantial factor in causing any harm to Rogers, including causing the collision in the first place. The record shows Peterson maintained throughout the case that Rogers was 100 percent at fault for the collision. The jury heard the evidence on that issue, including from the parties' experts, which was conflicting, and determined Peterson was not the legal cause of any harm to Rogers, which finding, as we have noted, could reasonably be explained on this record based on the fact Rogers was unharmed in the collision, that Rogers sought damages for pre-existing medical conditions and/or that Rogers, and not Peterson, was the legal cause of the collision.

Our role, like that of the trial court, is to prevent a miscarriage of justice, not to afford a review of the jury's deliberations. (*Trujillo v. North County Transit Dist.* (1998) 63 Cal.App.4th 280, 284.)

Here, based on our review of the entire record (see *Nazari v. Ayrapetyan* (2009) 171 Cal.App.4th 690, 693-694), we independently conclude that substantial evidence supports the jury's determination that Peterson was not a substantial factor in causing harm to Rogers, including causing the collision in the first place. (See *Lane v. Hughes Aircraft Co.* (2000) 22 Cal.4th 405, 412 [a reviewing court will reverse only if the " 'opposing party demonstrates that no reasonable finder of fact could have found for the movant on [the trial court's] theory' "]; see also *Mason v. Lake Dolores Group* (2004) 117 Cal.App.4th 822, 829 [on appeal from a JNOV, a court of review independently determines whether the record, viewed in the light most favorable to the verdict, contains any substantial evidence to support the verdict].)[4]

C. *Remaining Contentions*

Following the same or similar line of reasoning of his other contentions, Rogers argues the magnitude of the collision between the two cars was sufficient to cause his injuries and damage to his car.[5] Rogers also argues Peterson did not dispute at least

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4 In light of our decision, we deem it unnecessary to decide whether Rogers can establish that Peterson's negligence was the legal cause of some of his damages based on (1) statements made by Peterson's counsel in opening statements, which Rogers claims constituted a "judicial admission" (which we reject, in any event) and (2) the testimony of Peterson's medical expert (Dr. Ostrup), that Rogers *may* have suffered a *possible* lumbar strain from the collision.

5 Rogers did not seek reimbursement from Peterson for damages to his car.

$10,000 in medical expenses he incurred for the ambulance and ER treatment on the date of accident, which he argues shows he sustained some damage because of Peterson's negligence.

Again, we note the issue in this case is not damages, but causation. In any event, even if such evidence was relevant to causation, as before it was up to the jury to decide its significance, if any, and the reasonable inferences, if any, to draw from such evidence. (*Johnson v. Pacific Indem. Co.* (1966) 242 Cal.App.2d 878, 880.) Such evidence does not, however, compel the contrary finding (causation) as a matter of law, i.e., that under no reasonable hypothesis could a jury find Peterson's negligence did not cause the collision and/or Rogers's alleged resulting harm. (See *Horn v. Oh*, *supra*, 147 Cal.App.3d at p. 1099.)

DISPOSITION

The judgment is affirmed. Peterson to recover her costs of appeal.

BENKE, Acting P. J.

WE CONCUR:

McDONALD, J.

McINTYRE, J.